

No. 11457

United States
Circuit Court of Appeals
For the Ninth Circuit.

ALVA ALEKSICH, as Administratrix of the
Estate of Jakor Aleksich, deceased,
Appellant,
vs.

MUTUAL BENEFIT HEALTH AND ACCI-
DENT ASSOCIATION, a corporation,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Montana

FILED

JAN 23 1947

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
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Butte, Montana.

Attorneys for Defendant and Appellee.

[*1]

* Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States in and
for the District of Montana

No. 178

ALVA ALEKSICH, as Administratrix of the
Estate of Jakor Aleksich, deceased,
Plaintiff,

vs.

MUTUAL BENEFIT HEALTH AND ACCI-
DENT ASSOCIATION, a Corporation,
Defendant.

Be It Remembered that on February 14, 1946,
Plaintiff's Complaint was filed herein, being in
the words and figures following, to-wit: [2]

COMPLAINT

The plaintiff complains and alleges:

1.

That at all times hereinafter mentioned, the defendant was, and now is, a corporation, organized and existing under and by virtue of the laws of the State of Nebraska, and carrying on a general life, health and accident insurance business in the State of Montana, but at all such times, the defendant was, and now is, a citizen of the state of Nebraska.

2.

That at all times hereinafter mentioned, the plaintiff was, and now is, a citizen of the State of Montana, and residing therein at the City of Butte.

3.

That the amount involved in this action at law, exclusive of interest and costs, is the sum of Twenty-four Thousand, Three Hundred, Seventy-four and 91-100 (\$24,374.91) Dollars. [3]

4.

That on or about November 25, 1944, Jakor Aleksich, then a resident of Silver Bow County, in Montana, died intestate, leaving estate in said county; that on January 14, 1946, the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, by an order duly given and made, appointed this plaintiff administratrix of the estate of Jakor Aleksich, deceased; plaintiff forthwith qualified as such, by filing the bond, and taking the oath required by law and by the said order. She is now the administratrix of the estate of Jakor Aleksich, deceased.

5.

That on October 6, 1943, in Silver Bow County, in Montana, the defendant, in consideration of Twenty-one and 50/100 (\$21.50) Dollars, paid to it by Jakor Aleksich, issued and delivered to Jakor Aleksich a written contract of insurance for one-fourth of a year thereafter, and agreed therein that the payment by said Jakor Aleksich to said defendant, and acceptance by defendant of Sixteen and 50/100 (\$16.50) Dollars, quarterly in advance, beginning January 1st, 1944, would keep said policy of insurance in continuous effect; that Jakor Aleksich made to the defendant every of such payments

of Sixteen and 50/100 (\$16.50) Dollars, quarterly in advance until he died, and defendant accepted all of the same. The said policy remained in full force and effect until Jakor Aleksich died.

6.

That the defendant in said policy insured Jakor Aleksich against all loss of time, commencing while said policy was in force, resulting directly and independently [4] of all other causes from bodily injuries during any term of this policy through purely accidental means, there were no limitations in the said policy contained on indemnity for total loss of time. The same was an open policy as to indemnity for total loss of time commencing while the policy was in force; and the said policy recited that: "This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance." That there was endorsed on the said policy when delivered to Jakor Aleksich these words:

"Beware—Your policy with us is the best insurance you can buy."

There was also endorsed on said policy when delivered; the following words, punctuated as follows:

"This policy provides benefits for loss of limb, sight or time, by accidental means, or loss of time by sickness as herein provided."

7.

That on or about November 25, 1944, the insured, Jakor Aleksich, was severely injured in body in

the Anselmo Mine in Silver Bow County, Montana, in the United States of America, while the said policy was in force; that said injuries were so severe as to completely, and for all time thereafter, destroy Jakor Aleksich's ability to put his time, which he would have had but for such injuries, to any valuable use, or to therein earn any money; that Jakor Aleksich survived the said injuries an appreciable length of time, to-wit: More than one hour, and during such hour he owned a cause of action against the defendant for total loss of his time that [5] he would have had, and could have put to valuable work but for such injuries; that during such time of his survival of said injuries, he did not commence any action or suit to enforce collection of said cause of action; that under the law of Montana, wherein said contract was executed, such cause of action survived to this administratrix, and is now being prosecuted. Also plaintiff alleges that no payment of any kind was ever made at all by the said defendant to Jakor Aleksich, or to this plaintiff as administratrix, for such loss of time, or for any part thereof.

8.

That Jakor Aleksich, on the 25th day of November, 1944, was of the age of fifty-six years, four months and twenty-eight days; that he was, before the total permanent injuries occurring to him, as aforesaid, of robust health, strong, active and intelligent as a miner, which was his occupation; that he had an earning capacity of Seven and 75/100 (\$7.75) Dollars per day; that his services were in

demand for five days per week, and would have remained in demand during his expectancy for the same number of days, and at the same rate; that he had an expectancy of life under the American table of 16.5 years; that because of his robust health, he had an actual expectancy of a longer life than 16.5 years; that his annual earnings were Two Thousand, Fifteen (\$2,015.00) Dollars; that his expected life earnings were Thirty-three Thousand, Two Hundred, Forty-seven and $51/100$ (\$33,247.51) Dollars; that the legal rate of interest in Montana, at all times herein mentioned, was, and is, Six (6%) percent, per annum; that a a Five (5%) percent. annual discount for 16.5 years, or 858 weeks, the present [6] value of his time, at the time he was so injured, was Twenty-four Thousand, Three Hundred, Seventy-four and $91/100$ (\$24,374.91) Dollars, in which amount the defendant agreed to pay for Jakor Aleksich's loss of time by the said policy. That an exact copy of the said policy is hereunto annexed and made a part hereof, marked "Exhibit A."

9.

That immediately after the death of Jakor Aleksich, as provided in the said policy, this plaintiff, who was the beneficiary named therein, gave notice to the defendant of the injuries and death of Jakor Aleksich; that the defendant, within fifteen days after the death of Jakor Aleksich, in writing, denied that there was any liability at all of the defendant under the said policy.

Wherefore, the plaintiff demands judgment against the defendant for the sum of Twenty-four Thousand, Three Hundred, Seventy-four and 91/100 (\$24,374.91) Dollars, and for her costs of suit.

H. L. MAURY,
A. G. SHONE,
Attorneys for Plaintiff.

Complaint drawn by:

LAUNDES MAURY,
33 Hirbour Building,
Butte, Montana. [7]

EXHIBIT "A"

PERFECT INCOME POLICY

This Policy Provides Benefits for Loss of Limb, Sight or Time, by Accidental Means, or Loss of Time by Sicknes as Herein Provided.

MUTUAL BENEFIT HEALTH AND ACCI-
DENT ASSOCIATION, OMAHA
(Herein called the Association)

Hereby insures Jakor Aleksich (herein called the Insured), of City of Butte, State of Montana, against loss of limb, sight or time, sustained or commencing while this policy is in force, resulting directly and independently of all other causes, from bodily injuries sustained during any term of this policy, through purely accidental means, and against loss of time beginning while this policy is in force and caused by disease contracted during

any term of this policy, respectively, subject, however, to all the provisions and limitations hereinafter contained.

The date of this policy is October 6, 1943.

The copy of the application attached hereto is hereby made a part of this contract, and this policy is issued in consideration of the statements made by the Insured in the application and the payment in advance of Twenty-one and 50/100 (\$21.50) Dollars as first payment. The payment in advance, and acceptance by the Association, of premiums of Sixteen & 50/100 (\$16.50) Dollars quarterly thereafter, beginning with Jan. 1, 1944, is required to keep this policy in continuous effect.

Accident Indemnities

Specific Losses

Part A.

If the Insured shall sustain bodily injuries, as described in the Insuring Clause, which injuries shall, independently and exclusively of disease, and all other causes, continuously and wholly disable [8] the Insured from the date of the accident and result in any of the following specific losses within thirteen weeks, the Association will pay:

For loss of both hands.....	\$1,000.00
For loss of both feet.....	1,000.00
For loss of one hand and one foot.....	1,000.00
For loss of entire sight of both eyes.....	1,000.00
For loss of one leg.....	700.00
For loss of one arm.....	700.00

For loss of one hand.....	500.00
For loss of one foot.....	500.00
For loss of entire sight of one eye.....	200.00
For loss of thumb and index finger of either hand	300.00
For loss of one or more fingers.....	100.00
For loss of one or more entire toes.....	100.00

Loss in every case referred to in the above schedule for dismemberment of hand or hands, or foot or feet, shall mean severance at or above the wrist or above the ankle joint, respectively. The loss of eye or eyes shall mean the total and irrecoverable loss of entire sight thereof. Loss of arm or leg shall mean severance at or above the elbow or the knee joint, respectively. Loss of thumb, finger or toe shall mean severance of at least one entire phalanx. Only one of the amounts named will be paid for injuries resulting from one accident, and shall be in lieu of all other indemnity.

Part B.

Total Accident Disability Benefits Eighty Dollars Per Month

If such injuries, as described in the Insuring Clause, do not result in any of the above mentioned specific losses, but shall wholly and continuously disable the Insured for one day or more, the Association will pay a monthly indemnity at the rate of Forty (\$40.00) Dollars for the first month, and at the rate of Eighty (\$80.00) Dollars per month thereafter, but not to exceed twenty-four months.

Part C.

Partial Accident Disability Benefits
Thirty Dollars Per Month

If such injuries, as described in the Insuring Clause, shall wholly and continuously disable the Insured from performing one or more important duties, the Association will pay for the period of such partial loss of time, but not exceeding three consecutive months, a monthly indemnity of Thirty (\$30.00) Dollars. [9]

Part D.

Medical Attendance Twenty Dollars

If such injuries, as described in the Insuring Clause, require immediate medical or surgical treatment by a physician, surgeon or osteopath, and the Insured makes no other claim on account of such injuries, the Association will reimburse the Insured for the cost thereof, but not exceeding Twenty (\$20.00) Dollars.

Part E.

Financial Aid Two Hundred Dollars

If such injuries render the Insured physically unable to communicate with friends, the Association will, upon receipt of a message giving this policy number, immediately transmit to the relatives or friends of the Insured any information respecting him, and will defray all expenses necessary to put the Insured in communication with, and in the care of friends, providing such expense shall not exceed

the sum of Two Hundred (\$200.00) Dollars. This benefit to be in addition to any other benefits.

Part F.

Confining Illness Disability Benefits

Eighty Dollars Per Month

If disability resulting from disease, the cause of which originates more than thirty days after the effective date of this policy, confines the Insured continuously within doors and requires regular visits therein by a legally qualified physician, the Association will pay at the rate of Forty (\$40.00) Dollars for the first month, and at the rate of Eighty (\$80.00) Dollars per month thereafter, but not to exceed twelve months; provided said disease causes total disability and necessitates total loss of time.

Part G.

Non-Confining Illness Disability

Forty Dollars Per Month

If disability resulting from disease, the cause of which originates more than thirty days after the effective date of this policy, does not confine the Insured continuously within doors, but requires regular medical attention, the Association will pay at the rate of Forty (\$40.00) Dollars per month, but not to exceed one month; provided said disease necessitates continuous total disability and total loss of time. [10]

Part H.

Additional Benefits If Confined to Hospital

If the Insured, on account of any disability cov-

ered by this policy, shall be continuously confined within a hospital for one day or more, the Association will pay for such hospital confinement an additional indemnity at the rate of Forty (\$40.00) Dollars per month, but not to exceed three consecutive months.

Standard Provisions

1. This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance. No reduction shall be made in any indemnity herein provided by reason of change in the occupation of the Insured, or by reason of his doing any act or thing pertaining to any other occupation.

2. No statement made by the applicant for insurance not included herein shall avoid the policy, or be used in any legal proceeding hereunder. No agent has authority to change this policy, or to waive any of its provisions. No change in this policy shall be valid unless approved by an executive officer of the Association, and such approval be endorsed hereon.

3. If the default be made in the payment of the agreed premium for this policy, the subsequent acceptance of a premium by the Association, or by any of its duly authorized agents, shall reinstate the policy, but only to cover accidental injury thereafter sustained, and such sickness as may begin more than ten days after the date of such acceptance.

4. Written notice of injury or of sickness on

which claim may be based must be given to the Association within twenty days after the date of the accident causing such injury, or within ten days after the commencement of disability from such sickness. In event of accidental death, immediate notice thereof must be given to the Association.

5. By such notice given by or in behalf of the Insured or beneficiary, as the case may be, to the Association at Omaha, Nebraska, or to any authorized agent of the Association, with particulars sufficient to identify the Insured, shall be deemed to be notice to the Association. Failure to give notice within the time provided in this policy shall [11] not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice, and that notice was given as soon as was reasonably possible.

6. The Association, upon receipt of such notice, will furnish to the claimant such forms as are usually furnished by it for filing proofs of loss. If such forms are not so furnished within fifteen days after the receipt of such notice the claimant shall be deemed to have complied with the requirements of this policy as to proof of loss upon submitting within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence, character and extent of the loss for which claim is made.

7. Affirmative proof of loss must be furnished to the Association at its said office in case of claim for loss of time from disability within ninety days

after the termination of the period for which the Association is liable, and in case of claim for any other loss, within ninety days after the date of such loss.

8. The Association shall have the right and opportunity to examine the person of the Insured when and so often as it may reasonably require during the pendency of claim hereunder, and also the right and opportunity to make an autopsy in case of death where it is not forbidden by law.

9. All indemnities provided in this policy for loss other than that of time on account of disability, will be paid within sixty days after receipt of due proof.

10. Upon request of the Insured and subject to due proof of loss all of the accrued indemnity for loss of time on account of disability will be paid at the expiration of each month during the continuance of the period for which the Association is liable, and any balance remaining unpaid at the termination of such period will be paid immediately upon receipt of due proof.

11. Indemnity for loss of life of the Insured is payable to the beneficiary if surviving the Insured, and otherwise to the estate of the Insured. All other indemnities of this policy are payable to the Insured. [12]

12. If the Insured shall at any time change his occupation to one classified by the Association as less hazardous than that stated in the policy, the

Association, upon written request of the Insured, and surrender of the policy, will cancel the same, and will return to the Insured the unearned premium.

13. Consent of the beneficiary shall not be requisite to surrender or assignment of this policy, or to change of beneficiary, or to any other changes in the policy.

14. No action at law, or in equity shall be brought to recover on this policy prior to the expiration of sixty days after proof of loss has been filed in accordance with the requirements of this policy, nor shall such action be brought at all unless brought within two years from the expiration of the time within which proof of loss is required by the policy.

15. If any time limitation of this policy with respect to giving notice of claim or furnishing proof of loss is less than that permitted by the law of the state in which the Insured resides at the time this policy is issued, such limitation is hereby extended to agree with the minimum period permitted by such law.

Additional Provisions

(a) This policy does not cover death, disability, or other loss sustained in any part of the world except the United States and Canada, or while the Insured is engaged in military or naval service in time of war, or any act of war, or while the Insured is not continuously under the professional care and regular attendance, at least once a week,

beginning with the first treatment, of a licensed physician or surgeon, other than himself; or received because of, or while participating in aeronautics; or resulting from insanity; or disability from any disease of organs which are not common to both sexes.

(b) Strict compliance on the part of the Insured and beneficiary with all the provisions and agreements of this policy, and the application signed by the Insured, is a condition precedent to recovery, and [13] any failure in this respect shall forfeit to the Association all right to any indemnity.

(c) The term of this policy begins at 12 o'clock noon, Standard Time at the place where the Insured resides, on the date hereof against accident, and on the thirty-first day thereafter against disease, and ends at 12 o'clock noon on date any renewal is due.

(d) The mailing of notice to the Insured at least fifteen days prior to the date they are due shall constitute legal notice of dues, and should the premium provided for herein be insufficient to meet the requirements of the Association, it may call for additional premium. The acceptance of any renewal premium shall be optional with the Association. No provision of the charter or by-laws of the Association not included herein shall avoid the policy or be used in any legal proceeding hereunder.

(e) The annual meeting of the Association will be held at ten o'clock a.m. on the second Saturday

after the first day of February, at the Home Office of the Association.

In Witness Whereof, Mutual Benefit Health & Accident Association has caused this policy to be signed by its President and its Secretary, but the same shall not be binding upon the Association unless countersigned by its duly authorized Policy Clerk, nor unless delivered to the Insured while in good health and free from injury.

C. C. CRISS,
President.

C. E. FORBES,
Secretary.

Countersigned by:

M. C. KINSLEY,
Policy Clerk.

CHAS. A. CHALKLEY,
Resident Vice-President. [14]

APPLICATION FOR INSURANCE

Use black ink—This is to be photographed.

1. What is your full name?

Mr. Jakor Aleksich.

(Print full first, middle and surname.)

2. What is your residence address? 104 East Park. County? Silver Bow. City or town? Butte. State? Mont. Address to which premium notices are to be sent? Same as above.

3. What is your age? 55. Race? White. National-

ity? Serbian. Date of birth? June 28, 1888. Place of birth? Serbia. Height? 6-1. Weight? 185 pounds. Sex? Male.

4. Whom do you name as beneficiary? Alva Aleksich. Address? Murray Hospital, Butte, Mont. (Print full first, middle and surname.) Relationship? Niece.

5. What is your occupation? Miner, underground.

6. What are all of your duties connected therewith? General underground mining.

7. Name of firm? Anaconda Copper Mining Co. Nature of business? Mining and smelting. Location of firm? Butte, Montana. (Street, City and State)

8. Do your average monthly earnings exceed the monthly indemnity payable under the policy now applied for and under all other disability insurance now carried by you? Yes. What are your average monthly earnings? \$200.00.

9. What disability or accidental death insurance do you carry? What companies and amounts? \$2,200.00. Group life. Serbian Lodge #3, \$1,000.00, life, Butte, Mont. Have you any applications for life or disability insurance pending? Answer as to each? None.

10. Has any application ever made by you for life or disability insurance been declined, postponed or rated up, or has any life or disability insurance issued to you been cancelled? Answer as to each? None. Has any renewal or reinstatement of life or

disability insurance been refused? Answer as to each? None. If so give full particulars.

11. Have you ever made claim for, or received indemnity on account of any injury or illness? If so, what companies, dates, amounts and causes? None.

12. What is the form of policy applied for? 30-D. What is the premium? \$21.50 1st qr. \$16.50 sub. How much premium have you paid? \$21.50.

13. Are you sound physically and mentally? Answer as to each? Yes. Are you maimed or deformed? Answer as to each. None. Have you any impairment of sight or hearing? Answer as to each? None. Are your habits correct and temperate? Yes.

14. Have you ever had any of the following diseases? Rheumatism, neuritis, arthritis, sciatica, epilepsy, appendicitis, diabetes, any kidney or bladder trouble, any disease of the brain or nervous [15] system, heart disease, tuberculosis, bronchitis, gall bladder trouble, any stomach trouble, any intestinal trouble, hernia, cancer, syphilis, high or low blood pressure, tonsillitis, rectal trouble, malaria?

Name diseases, dates and length of disability? None.

Has any member of your family ever had tuberculosis? None.

15. Have you received medical or surgical treatment, or had any local or constitutional disease not mentioned above, within the last five years? Answer as to each? None, except minor colds. In?.....

For?..... Lasting?..... Year and month.
Nature.

16. Have you ever been operated on by a physician or sugeon? Removal of tonsils. Date? 1928. For? Tonsils removed. Fully recovered. St. James Hospital, Butte.

17. Do you understand and agree that no insurance will be effected until the policy is accepted by you while in good health and free from injury? Yes.

18. Do you hereby apply to the Mutual Benefit Health & Accident Association for a policy to be issued solely and entirely upon the written answers to the foregoing questions, and do you agree that the Association is not bound by any statement made by or to any agent unless written herein, and do you agree to notify the Association promptly of any change in your occupation, or if you take additional insurance, and do you hereby authorize any physician or other person who has attended, or may attend you, to disclose any information thus acquired? Yes.

19. Do you authorize the Association to make such alteration in the application as may correct any spelling therein, or to correct any other apparent error or omission, and do you agree that your acceptance of such policy shall ratify such alterations? Yes.

Your check made payable to the Company is your receipt. (This is important.)

Dated at Butte, Mont., this 28 day of Sept., 1943.

Signature of Applicant:

JAKOR ALEKSICH.

What amount of premium have you paid? \$21.50.

Complaint filed Feb. 14, 1946.

/s/ H. H. WALKER,
Clerk. [16]

Thereafter, on March 6, 1946, Defendant's Answer was filed herein, being in the words and figures following, to-wit: [17]

[Title of District Court and Cause.]

ANSWER

Comes now Mutual Benefit Health and Accident Association, defendant in the above entitled action, and, for its answer to plaintiff's complaint filed herein, admits, denies, and alleges, as follows:

1. Admits the allegations contained in paragraph 1 of plaintiff's complaint, except that defendant denies that it is, or has been, carrying on a general life insurance business in the State of Montana.
2. Admits the allegations contained in paragraph 2 of plaintiff's complaint.
3. Admits that the amount involved in this ac-

tion, exclusive of interests and costs, as alleged in plaintiff's complaint is the sum of \$24,374.91, but denies that said amount, or any other sum or amount, is involved in this action.

4. Admits the allegations contained in paragraph 4 of plaintiff's complaint.

5. Admits the allegations contained in paragraph 5 of plaintiff's complaint. [18]

6. Answering the allegations contained in paragraph 6 admits that defendant insured Jakor Aleksich against loss of time sustained or commencing while said policy was in force, resulting directly and independently of all other causes from bodily injuries during any term of said policy through purely accidental means, subject to all the provisions and limitations in said policy contained; denies that there are no limitations in said policy on indemnity for total loss of time; denies that said policy is an open policy as to indemnity for loss of time commencing while the policy was in force. Admits that said policy recited that: "This policy includes endorsements and attached papers, if any, and contains the entire contract of insurance." Admits that there was pasted on said policy when delivered to Jakor Aleksich these words: "Beware—Your policy with us is the best insurance you can buy." Admits that there was endorsed on said policy when delivered the following words, punctuated as follows: "This policy provides benefits for loss of limb, sight or time, by accidental means, or loss of time by sickness as herein provided."

7. Answering the allegations of paragraph 7, admits that on or about November 25, 1944, the insured, Jakor Aleksich, was severely injured in body in the Anselmo Mine, in Silver Bow County, Montana, in United States of America, while said policy was in force; admits that said injuries were so severe as to completely, and for all time thereafter, destroy Jakor Aleksich's ability to put his time, which he would have had but for such injuries, to any valuable use, or to earn any money; admits that said Jakor Aleksich survived said injuries for an appreciable length of time, to-wit: about one hour, but denies that during such hour he owned a cause of action against the defendant for total loss of his time that he would have had, and could have [19] put to valuable work, but for such injuries; admits that during such time of his survival of said injuries, he did not commence any action or suit to enforce collection of said alleged cause of action; denies that any such alleged cause of action survive to his administratrix. Admits that no payment of any kind was made at all by defendant to Jakor Aleksich, or to plaintiff as Administratrix, for loss of time.

8. Answering the allegations of paragraph 8, admit that Jakor Aleksich on the 25th day of November, 1944, was of the age of fifty-six years, four months and twenty-eight days, and that he was before the total permanent injuries occurring to him, resulting in his death, of robust health and a strong and active and intelligent miner, which was his occupation; admits that he had an earning

capacity of \$7.75 per day; admits that his services were in demand for five days per week, and denies any knowledge or information sufficient to form a belief as to whether his services would have remained in demand for the same number of days at the same rate during his life expectancy; denies any knowledge or information sufficient to form a belief as to whether his life expectancy was 16.5 years, and denies any knowledge or information sufficient to form a belief that he had an actual expectancy of a longer life than 16.5 years; denies any knowledge or information sufficient to form a belief as to the amount of his annual earnings; denies any knowledge or information sufficient to form a belief that his expected life earnings were \$33,247.51; admits that the legal rate of interest in Montana at all times mentioned in plaintiff's complaint was and is six per cent per annum; denies any knowledge or information sufficient to form a belief that the present value of his time, at the time he was injured, was \$24,374.91, or any other sum or amount; and denies that defendant agreed to [20] pay for Jakor Aleksich's loss of time in such amount or in any amount except as provided by the terms of said policy. Denies that an exact copy of said policy is attached to plaintiff's complaint, marked "Exhibit A", and alleges that defendant attaches as a part of this answer a true copy of said policy in the form executed and delivered to said Jakor Aleksich, except that it has stamped on its face "Sample Copy."

9. Answering the allegations of paragraph 9,

defendant admits that immediately after the death of Jakor Aleksich, as provided in said policy, plaintiff gave notice to the defendant of his injuries and death, and that defendant within fifteen days after the death of Jakor Aleksich denied, in writing, any liability of defendant under said policy.

10. Denies that plaintiff is entitled to a judgment in the sum of \$24,374.91, or in any other sum or amount, under the contract of insurance set forth in plaintiff's complaint.

Wherefore, defendant having fully answered plaintiff's complaint, prays that plaintiff take nothing by reason of her alleged cause of action, and that defendant have judgment for its costs.

/s/ J. A. POORE,

/s/ JAMES A. POORE, JR.,

Attorneys for Defendant.

Service of the foregoing Answer is admitted and copy thereof received this 6th day of March, 1946.

/s/ H. L. MAURY,

/s/ A. G. SHONE,

Attorneys for Plaintiff.

Answer filed March 6, 1946.

/s/ H. H. WALKER,

Clerk. [21]

[Printer's Note]: Mutual Benefit Perfect Income Policy set out on pages 7 to 17.

Thereafter, on May 23, 1946, Plaintiff's Motion to Amend the Complaint and the Exhibit attached thereto, was filed herein, being in the words and figures following, to-wit: [24]

[Title of District Court and Cause.]

MOTION TO AMEND

Comes now the plaintiff and moves the court for leave to amend the complaint by striking from the second line on page three thereof, and the third and fourth lines on page three thereof, the following words:

“Subject, however, to all of the provisions and limitations thereafter contained in the policy”.

And also leave to amend by striking from the said complaint the word “thereafter” on page 3, line five.

Also move to amend by striking from “Exhibit A” to the Complaint, a comma after the word “sickness” in the caption in the third line of the Exhibit.

H. L. MAURY,

A. G. SHONE,

Attorneys for plaintiff.

NOTICE

This motion will be presented to the Court im-

mediately before the opening of the trial of the said cause on [25] May 23rd, 1946.

H. L. MAURY,

A. G. SHONE,

Attorneys for plaintiff.

Service of the foregoing Motion and Notice is hereby acknowledged, and copy thereof received this 14th day of May, 1946.

JAMES A. POORE, JR.,

Attorney for defendant.

Filed May 23, 1946.

/s/ H. H. WALKER,

Clerk. [26]

Thereafter, on May 23, 1946, an Order allowing amendment to the Complaint and Exhibit attached, was duly made and entered herein, being in the words and figures following, to-wit: [27]

[Title of District Court and Cause.]

ORDER ALLOWING AMENDMENT TO
COMPLAINT

This cause came on regularly for trial this day, Mr. H. L. Maury being present and appearing for the plaintiff, and Mr. James A. Poore, Jr., being present and appearing for defendant.

Thereupon Mr. Poore asked that the name of Mr. William Meyer be entered as associate counsel for the defendant and it was so ordered.

Thereupon Mr. Maury filed and presented to the Court a motion to amend the complaint herein, and moved the Court for leave to amend the complaint in accordance with said motion, to-wit: by striking out the words "Subject, however, to all of the provisions and limitations thereafter contained in the policy", appearing on page 3, lines 2, 3 and 4; by striking the word "thereafter", appearing on page 3, line 5, and by striking from Exhibit A to the complaint, a comma appearing after the word "sickness", in the caption in the third line of said Exhibit.

Thereupon counsel for defendant stated that they have no objection to the granting of the motion to strike the comma from the Exhibit, whereupon Court ordered that the amendment be made by the Clerk.

Thereupon counsel for the defendant objected to the other amendments requested, whereupon, after the arguments of counsel, Court ordered that the objections be overruled, that the motion for leave to amend be granted, and that the amendments be made by interlineation by the Clerk.

Thereupon the defendant's motion to dismiss, heretofore filed herein, was called up for hearing and was argued by counsel, whereupon, after due consideration, Court ordered that said motion to dismiss be denied and that the defendant be granted an exception to the Court's ruling.

Thereupon, the policy sued upon, marked Plaintiff's Exhibit No. 1, was offered in evidence, where-

upon defendant objected to the introduction of any evidence herein for the reason the Court has no jurisdiction of the subject matter of this action, and for other [28] reasons stated. Thereupon Court ordered that the objection be overruled and the defendant granted an exception to the Court's ruling.

Thereupon Plaintiff's Exhibit No. 1 was received in evidence without objection. Plaintiff's Exhibit No. 2, being a certain statement from the Anaconda Copper Mining Company, showing the earnings of Jakor Aleksich for the years 1943 and 1944, was offered and received in evidence over the objection of defendant, and an exception granted defendant.

Thereupon Mike Pezelj and Julian H. Heilbronner were sworn and examined at witnesses for the plaintiff, whereupon plaintiff rested.

Thereupon defendant moved the Court to direct a non-suit herein or to dismiss the action, for the reason that the Court has no jurisdiction of the subject matter of this action, and for other reasons stated, whereupon Court ordered that said motion be denied and an exception granted defendant.

Thereupon the defendant offered no evidence and rested.

Thereupon, the plaintiff having this day served on counsel for defendant and filed herein, its brief in chief, it is ordered that defendant be granted twenty days from this day within which to prepare, serve and file an answering brief; that the plaintiff be granted ten days, after service upon her of de-

fendant's brief, within which to prepare, serve and file a reply brief if so advised, and that upon the filing of the final brief, or the expiration of the time granted therefor, the cause will be deemed submitted to the Court for decision.

Court further ordered that each of the parties be granted until the time for filing the final brief herein, within which to submit to the Court proposed findings of fact and conclusions of law.

Entered in open Court at Butte, Montana, May 23, 1946.

H. H. WALKER,

Clerk. [29]

Thereafter on August 14, 1946, the Opinion of the Court was duly filed herein, being in the words and figures following, to-wit: [29-a]

[Title of District Court and Cause.]

OPINION

Plaintiff contends that the decedent in his lifetime acquired a cause of action against the defendant because of a policy of insurance written by defendant, insuring the decedent for loss of time from bodily injury through accidental means. Plaintiff alleges in her complaint that decedent, while at his work, received bodily injuries which caused his death within an hour after such injuries were inflicted upon him; that at that time his expectancy of life was 16.5 years, and except for the injuries he would have lived that time, was employ-

able and would have continued to receive compensation for his work and that the present worth or value of that time to him is in excess of \$24,000.00.

The correctness of plaintiff's position requires a construction of the contract and a determination of its meaning under the laws of the State of Montana, they being controlling here as the case is in this court solely by virtue of diversity of citizenship and the state law controls here. The state law controlling the decision here is in part what the Supreme Court of the State of Montana says it to be. *Erie Railroad Co. v. Tompkins*, 304 U. S. 64. This court is controlled in this case by the pronouncements of the Supreme Court of the State of Montana and in that respect this court sits as but another inferior court of the State of Montana. *Erie Railroad Co. v. Tompkins*, *supra*. [29-b]

It appears that an action was heretofore commenced in the State Court on this same policy against the defendant by the present plaintiff, she then suing as the beneficiary named in the policy, and in the prayer of her complaint filed in the State Court she asked damages based on indemnity of \$40.00 for the first month and \$80.00 for each of the succeeding 23 months, for time lost by Jakor Aleksich on account of his being injured, this apparently under the provisions of Part B of the policy in evidence here as Exhibit 1. A demurrer to the complaint was sustained by the trial court and an appeal taken to the Supreme Court of Montana. The appeal called for a construction of the

policy by the Supreme Court as the action in this court does. The contention made by plaintiff there is the same as made here, i.e., that the insured suffered a loss of time after his death for 24 months, for which he was insured under the policy. The Supreme Court, in construing the policy, denied the contention made there and here. It directly held that the contract between the parties contemplated that the benefits would insure only to the insured during his lifetime and during the continuance of his disability and while he was alive to directly receive the payments. There, as I read the decision, the Supreme Court held that any loss of time suffered by the insured after his death was a loss of time caused by his death, and not by injuries, and the policy did not insure against loss of time occurring after death. The Supreme Court said, "From a careful consideration of the entire contract we are unable to find any agreement of indemnity against, or promise of reimbursement for death of the insured, or for loss of time resulting from death", and denied recovery. *Aleksich v. Mutual Benefit Health & Accident Association* (..... Mont.) 164 Pac. (2d) 372.

The Supreme Court of Montana thus held that under the law of Montana the insured was not insured by the defendant under the policy sued on here for a period of 24 months after his death. It seems to the Court that for the Court to hold in the face of that decision that the insured was insured under this same policy for his [29-c] expectancy of life or a period of 16.5 years after his

death or any other period of time after his death, it could only do so by construing the policy, and in so construing it, coming to a diametrically opposed view of its legal effect and meaning under the law of the State of Montana. The construction I might have placed on the contract had the Supreme Court of Montana not spoken is of no importance in view of the fact that a court whose decisions control mine as to what the law of the State is has spoken on the question.

Because of the law as established by the Supreme Court in the case herein referred to, it necessarily follows that the action must be dismissed. Findings of fact and conclusions of law and judgment in accordance herewith.

R. LEWIS BROWN,

U. S. District Judge.

Filed Aug. 14, 1946.

/s/ H. H. WALKER,

Clerk. [29-d]

Thereafter, on August 14, 1946, the Court filed its Findings of Fact and Conclusions of Law herein, being in the words and figures following, to-wit:

[Printer's Note]: Finding of fact and conclusions of law set out on pages 37 to 41.

Thereafter, on August 15, 1946, Plaintiff filed her Motion to Supplement Findings of Fact herein, being in the words and figures following, to-wit:

[Title of District Court and Cause.]

MOTION TO SUPPLEMENT FINDINGS OF FACT

Now comes the plaintiff and moves the Court to supplement the Findings of Fact herein with an additional Finding, as follows:

FINDING NO. VIII.

That Jakor Aleksich, the insured, survived his injuries an appreciable length of time, to-wit: About one hour."

H. L. MAURY,
A. G. SHONE,
Attorneys for Plaintiff.

NOTICE

To the above named defendant, and to Messrs. William Meyer and James A. Poore, Jr.:

Please take notice that on Monday, the 19th day of August, 1946, the plaintiff will Present to the Court at the opening of the Court, the above entitled Motion.

H. L. MAURY,
A. G. SHONE,
Attorneys for Plaintiff. [35]

Service of the foregoing Motion and Notice is

hereby acknowledged, and copy thereof received this
15th day of August, 1946.

/s/ WILLIAM MEYER,

/s/ JAMES A. POORE, Jr.,

Attorneys for Defendant.

Filed Aug. 15, 1946.

/s/ H. H. WALKER,

Clerk.

Thereafter, on August 19, 1946, the Court entered
an Order granting the Motion to Supplement
Findings of Fact herein, being in the words and
figures following, to-wit:

[Title of District Court and Cause.]

ORDER GRANTING MOTION TO SUPPLEE-
MENTAL FINDINGS OF FACT

This cause was duly called for hearing this day
on plaintiff's Motion to supplement findings of fact
heretofore filed herein, Mr. H. L. Maury being
present and appearing for the plaintiff; there being
no appearance by counsel for defendant.

Thereupon, after hearing the argument of counsel
for plaintiff, in support of said Motion, Court or-
dered the record to show: That it is ordered that
the motion of the plaintiff to supplement the find-
ings of fact of the Court heretofore made in the
language set out in its motion is granted and the

proposed finding of fact Number VIII set out in the plaintiff's motion to supplement the findings of fact is adopted by the Court as the Court's findings of fact to all intents and purposes and as fully and completely as though the same were set out in the identical language in the findings of the Court dated August 14, 1946, and the findings of fact of the Court dated August 14, 1946, are amended nunc pro tunc as of that date to include the proposed finding of fact Number VIII.

It is further ordered by the Court that on the application of Mr. H. L. Maury, counsel for plaintiff, the plaintiff be and is granted 30 days in addition to the time allowed by law, to prepare, serve and file a statement of the evidence, and statement of points relied upon, on appeal herein.

Entered in open Court at Butte, Montana, August 19, 1946.

H. H. WALKER,
Clerk. [38]

Thereafter, on August 21, 1946, a Judgment was duly filed and entered herein, being in the words and figures following, to-wit:

In the District Court of the United States, in and
for the District of Montana,

No. 178.

ALVA ALEKSICH, as Administratrix of the Estate
of Jakor Aleksich, Deceased,

Plaintiff,

vs.

MUTUAL BENEFIT HEALTH AND ACCI-
DENT ASSOCIATION, a corporation, .

Defendant.

JUDGMENT

Plaintiff having filed her complaint in this cause, and the defendant having been duly served with summons and a copy of the complaint, and having answered, and the cause having proceeded to trial on the merits, before the court without a jury, and the court having heard and considered the evidence, both oral and documentary, offered by the parties, and considered arguments of counsel, and briefs having been submitted, and the court having made its Findings of Fact and Conclusions of Law as follows, to-wit:

FINDINGS OF FACT

I.

“That the defendant was and is a corporation,

a citizen of the State of Nebraska, carrying on a general health and accident insurance business in the State of Montana; that except for the contract and insurance policy, Exhibit 1 introduced in evidence herein, there is no evidence that the defendant carried on at any time a general life insurance business in the State of Montana.

II.

“That the plaintiff was and now is a citizen and resident of the City of Butte, State of Montana. [40]

III.

“That the amount involved in this action at law, exclusive of interest and costs, is the sum of \$24,374.91.

IV.

“That on the 6th day of October, 1943, in pursuance of an application for insurance made by Jakor Aleksich, the defendant made, executed and delivered to the said Jakor Aleksich, in consideration of the payment of premiums therein set forth, an insurance policy, introduced in evidence as plaintiff's Exhibit 1.

V.

“That on or about November 25, 1944, Jakor Aleksich sustained bodily injuries through purely accidental means in Butte, Silver Bow County, Montana, and as a result of such injuries he died within approximately one hour after sustaining the same; that at the time of his said death the said insurance policy introduced in evidence as plaintiff's

Exhibit 1 was in full force and effect. The said Jakor Aleksich had paid all of the premiums due and payable thereunder and had performed all the terms thereof on his part to be performed.

VI.

“That thereafter the plaintiff herein was duly and regularly appointed the administratrix of the estate of the said Jakor Aleksich, deceased, by an order duly given and made by the State Court having jurisdiction thereof, and at the time of the commencement of this action she was and now is the duly and regularly appointed, acting and qualified administratrix of the estate of Jakor Aleksich, deceased.

VII.

“That Jakor Aleksich at the time of his death was of the age of 56 years, 4 months and 28 days and had a normal and natural expectancy of life of 16.5 years; that he was healthy, strong and active and a miner by occupation, was employed as such and receiving for his services the sum of \$7.75 a day and had an earning capacity of such sum and except for such accidental injuries causing his death would have had and enjoyed the ability to work and earn money as a miner during his life expectancy and would have earned annually the sum of approximately \$2,000.00 per year.”

“From the foregoing facts the Court draws the following

CONCLUSIONS OF LAW

I.

“That the court has jurisdiction hereof.

II.

“That by virtue of the terms and provisions of the contract introduced in evidence as plaintiff’s Exhibit 1 the said Jakor Aleksich was insured only against such loss of time resulting from bodily injuries causing disability he sustained after infliction of such bodily injuries and prior to his death and was not insured against any loss of time resulting from his death.

III.

“That the plaintiff is not entitled to recover any judgment whatsoever against the defendant.

IV.

“That judgment should be entered herein in favor of the defendant dismissing the above entitled action and for defendant’s costs herein necessarily incurred and to be taxed by the Clerk of this Court.

“Let decree be entered accordingly.

“Done and dated this 14th day of August, 1946.

R. LEWIS BROWN,

U. S. District Judge.”

It is therefore Ordered, Adjudged and Decreed,—

1. That the plaintiff take nothing by reason of her alleged cause of action and that plaintiff’s complaint be and the same is hereby dismissed.

2. That the defendant have judgment against the plaintiff, Alva Aleksich, for its costs herein taxed in the sum of five dollars (\$5.00).

Done and dated 21st day of August, 1946.

R. LEWIS BROWN,
U. S. District Judge.

Filed and Entered Aug. 21, 1946.

H. H. WALKER,
Clerk. [42]

Thereafter, on September 23, 1946, a Notice of Appeal was duly filed herein, and copy mailed to the attorneys for the defendant, said Notice of Appeal being in the words and figures following, to-wit:

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Defendant, Mutual Benefit Health and Accident Association, a Corporation, and to James A. Poore, Jr., and William Meyer, its attorneys:

Notice is Hereby Given that Alva Aleksich, as administratrix of the Estate of Jakor Aleksich, deceased, plaintiff above-named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 21st day of August, 1946.

Dated this 23rd day of September, 1946.

H. L. MAURY,

A. G. SHONE,

Attorneys for Plaintiff. 33

Hirbour Building, Butte,

Montana.

Filed Sept. 23rd, 1946.

/s/ H. H. WALKER,

Clerk. [44]

Thereafter, on September 23, 1946, an Undertaking on Appeal was duly filed herein, being in the words and figures following, to-wit: [45]

[Title of District Court and Cause.]

UNDERTAKING ON APPEAL

Whereas, a final judgment was entered in the above entitled action on the 21st day of August, 1946, in favor of the defendant, Mutual Benefit Health and Accident Association, a corporation, and against the plaintiff, Alva Aleksich, as administratrix of the estate of Jakor Aleksich, deceased; and,

Whereas, on the 23rd day of September, 1946, the said plaintiff above-named filed her notice of appeal from the judgment so entered in the above entitled action on the 21st day of August, 1946, with the Clerk of the above entitled Court, and has thereby appealed to the United States Circuit Court

of Appeals for the Ninth Circuit, from said judgment.

Now, Therefore, in consideration of the premises, and of said appeal, we, the undersigned residents of the State of Montana, do hereby jointly and severally undertake and promise, in the sum of Two Hundred, Fifty (\$250.00) Dollars, to secure the payment of costs if the said appeal is dismissed, or the said judgment affirmed, or of such costs as the Appellant Court may award if the judgment is modified, not exceeding, however, the said sum of Two Hundred Fifty (\$250.00) Dollars.

Witness our hands this 23rd day of September, 1946.

/s/ CARL SPILLUM.

/s/ PAUL CANNON.

Filed Sept. 23rd, 1946.

/s/ H. H. WALKER,

Clerk. [46]

State of Montana,
County of Silver Bow—ss.

Carl Spillum and Paul Cannon, sureties on the above and foregoing undertaking on appeal, being severally sworn, each for himself says:

That he is a resident and freeholder within the State of Montana, and is worth the sum specified in the foregoing undertaking as the penalty thereof

over and above all his just debts and liabilities, and exclusive of property exempt from execution.

/s/ CARL SPILLUM.

/s/ PAUL CANNON.

Subscribed and sworn to before me this 23rd day of September, 1946.

[Seal] L. B. ESSELSTYN,
Notary Public for the State of Montana; residing
at Butte. My commission expires September
27th, 1948. [47]

Thereafter, on September 24, 1946, a Statement of Points on Appeal was duly filed herein, being in the words and figures following, to-wit: [48]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

The Court erred in ordering and entering judgment for defendant because:

(a) The law of Montana is not, and the decision of the Montana Supreme Court cited in the findings as binding on the trial court, is not, to the effect that the plaintiff administratrix could not recover for time lost through accidental means by assured, when the cause of the entire loss of future time occurred before death, though part of the time actually lost was to run after death intervened.

(b) No prior adjudication was claimed in the answer; a judgment against a person is not binding

against a personal representative though it chance that the representative appointed be the same person.

(c) When a contract is integrated, (nor any mistake, fraud, undue influence claimed) the contract means, and must be enforced for its legal meaning. The expectations of either party as to what rights it confers, or what duties it enjoins, must be disappointed if outside the legal meaning.

(d) The policy here insured Jakor against loss of time caused by accidental means. Under Montana statute it was an open policy, for it was not limited by any subsequent words in the policy.

(e) The complaint is not for loss of time caused by death—death was set out merely as a requisite of the appointment of an administratrix; the complaint is for loss of time caused in totality before death an hour later. By repeated decisions of Montana construing a statute if an actionable act causing total loss occur, and the owner of the cause of action do not die instantly, the cause of action is complete, a representative may enforce it, and recover for effects which endured, continued after intervening death of owner of the cause of action.

(f) The learned trial judge failed to distinguish between a cause of action for death existing in an heir (beneficiary here) non-existent at common law, now given by statute (Lord Campbell's Act) and a cause of action for damages for personal injuries, which died with the death of the owner at common law, but now in its entirety enforceable, and may be

commenced by a representative because of the Montana statute of survival of all causes of action.

The judgment should be reversed for new trial and to assess the loss of the assured's time through accidental means admitted to have occurred.

H. L. MAURY,

A. G. SHONE,

Attorneys of Plaintiff and
Appellant.

Filed Sept. 24, '46.

/s/ H. H. WALKER,
Clerk. [50]

Thereafter, on September 24, 1946, a Transcript of
Testimony was duly filed herein, being in the
words and figures following, to-wit: [51]

[Title of District Court and Cause.]

TRANSCRIPT OF TESTIMONY

taken at the trial of the above-entitled cause before
the Honorable R. Lewis Brown, Judge, May 23,
1946.

Appearances:

For Plaintiff H. L. Maury and A. G. Shone, Esqs.

For Defendant: James A. Poore, Jr., and William
Meyer, Esqs. [52]

Mr. Maury: If your Honor please, a week ago
I served on counsel, notice of motion to amend the

complaint by striking the words "subject, however, to all of the provisions and limitations thereafter contained" appearing on page 3, lines 2, 3 and 4; and also to strike the word "thereafter" appearing on page 3, line 5; and also by striking from Exhibit A to the complaint the comma after the word "sickness", in the caption in the third line of said exhibit.

The Court: Is there any resistance to the motion?

Mr. Meyer: There is your Honor. Has your Honor read the pleadings in this case?

The Court: Yes I have.

Mr. Meyer: Well then, you undoubtedly have read the policy which is Exhibit A, but I should add first, if the Court please, that we have no objection to the striking of the comma after the word "sickness" in the third line of the exhibit. That undoubtedly is placed in there inadvertently.

Mr. Maury: Then I'll ask that the Clerk draw a circle around that comma in the complaint and a line out to the margin and mark it "stricken out".

The Court: Well the Clerk will make the amendment.

Mr. Maury: I want it to appear plainly what was done.

The Court: Very well.

Mr. Meyer: Otherwise we object to this amendment because there is apparently no reason for it, in that the policy being made a part of this complaint, the [53] allegations of the complaint in the cause of action is based on the statements in the policy itself, subject, however, to all the provisions

and limitations hereinafter contained, whether it was alleged in the complaint or not.

Perhaps I should add that I recognize the rule that the matter of permanent amendments is within the discretion of the Court; however, here there is nothing to move the discretion of the Court in so far as this amendment is concerned and we object to the amendment being made at this time or at all.

The Court: (After argument) The motion will be granted and the amendment allowed made by the Clerk striking from the complaint the various language included in the amendment.

Mr. Maury: Will counsel agree that this instrument is the policy (handing document)?

Mr. Meyer: Before we get to that, your Honor has noticed a motion to dismiss which I think should be argued first.

The Court: Very well, proceed.

(Motion argued by Mr. Poore and Mr. Maury.)

The Court: The motion is denied and an exception is granted to the defendant.

Mr. Maury: I now present the policy which was delivered to Jakor Aleksich.

Mr. Meyer: Before its introduction, the defendant objects to the introduction of any evidence on the ground and for the reason that the Court does not have jurisdiction over the subject matter of the action, in [54] that the sum which plaintiff can recover herein cannot equal the sum of three thousand dollars exclusive of interest and costs, and the same appears affirmatively from the contract of in-

surance which is the basis of plaintiff's cause of action;

Secondly that the complaint herein does not state facts sufficient to constitute a cause of action in favor of plaintiff and against defendant.

The Court: The motion is denied and defendant is granted an exception to the ruling of the Court.

Mr. Maury: Is this (handing document) the policy which was delivered to Jakor Aleksich?

Mr. Meyer: It is, Mr. Maury.

Mr. Maury: We offer it in evidence.

Mr. Meyer: There is no objection.

The Court: It may be admitted and considered read and any part referred to at any time by either counsel in the case.

Mr. Maury: I have here a statement from the Anaconda Copper Mining Company prepared by its Assistant Chief Clerk James M. Duggan. This statement shows the earnings of Jakor Aleksich for the years 1943 and 1944, the amounts paid him for his work and the number of shifts he worked, and I offer it in evidence.

I might say that counsel for the defendant have courteously agreed that we need not keep the Chief Clerk here. He was here this morning.

Mr. Meyer: We desire to object. We have agreed, your Honor, that if Mr. Duggan was here he would testify [55] this correctly shows the amount paid and the number of shifts worked by Mr. Aleksich at the time specified in this exhibit.

Mr. Maury: And that Mr. Duggan is Assistant

Chief Clerk of the Anaconda Copper Mining Company?

Mr. Meyer: Yes.

Mr. Maury: And do you agree that the Anaconda Copper Mining Company keeps and did keep a correct record of the men working for it and the amount paid different men?

Mr. Meyer: Yes.

Mr. Maury: And that Jakor Aleksich was one of its men and that this is a correct statement?

Mr. Meyer: Yes. Your Honor understands, we make no objection with reference to the authenticity of the record.

The Court: That is clear to me, yes.

Mr. Meyer: Now then the defendant objects to plaintiff's offered exhibit 2 on the ground and for the reasons that it is incompetent, irrelevant and immaterial in that under the complaint on file herein there could be no recovery for any amount under any set of circumstances in excess of or equal to the sum of three thousand dollars exclusive of interest and costs; and that the earnings and the amount of time, the number of shifts worked by Jakor Aleksich during his lifetime and particularly during the years 1943 and 1944 while employed by the Anaconda Copper Mining Company is immaterial to prove any issue in this case.

Next: That the contents of the offered exhibit No. 2 is irrelevant and immaterial for any purpose in this case for the reason that under the contract of insurance the amount which the plaintiff could recover if at all is distinctly specified in the policy

of insurance and the amount therein specified is binding upon the plaintiff, and the earnings or the amount paid Jakor Aleksich during the years 1943 and 1944 are irrelevant and immaterial for any purpose in this case.

The Court: The objection will be overruled and the exhibit will be received in evidence, and defendant is granted an exception.

MIKE PEZELJ,

called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Maury:

Q. State your name? A. Mike Pezelj.

Q. What has been your occupation for the last last few years, Mr. Pezelj? A. Miner.

Q. Were you acquainted with Jakor Aleksich, sometimes known as Jack Aleksich? A. Yes.

Q. Were you working with him as a partner in the Anselmo Mine? A. Yes.

Q. How long did you work with him there as a partner?

A. It was over two years; I couldn't exactly say.

Q. What kind of a man was he as to being strong?

Mr. Poore: Just a moment. If your Honor please, we object to this as being immaterial and

(Testimony of Mike Pezelj.)

incompetent, in that the answer has admitted the physical health.

Mr. Maury: I think that is right. I'll withdraw the question. The answer has admitted that.

Q. Now Mr. Pezelj, on the morning or evening, I don't which it was, of the 25th of November a year and a half ago, were you working with Jack Aleksich? A. Yes.

Q. Whereabouts were you working?

A. We were between the thirty-six and thirty-four hundred of the Anselmo working in the stope.

Q. And that mine is in this county?

A. Yes.

Q. When you were working there what happened to Aleksich?

Mr. Poore: To which we object as incompetent, irrelevant and immaterial in that the answer admits that Jakor Aleksich was *killed* on November 25 in the Anselmo mine and that he died shortly thereafter.

Mr. Maury: The answer doesn't admit that it was accidental. They admit he survived an hour but they don't admit the injury was accidental.

The Court: If that is the purpose of this testimony——

Mr. Maury: Yes, your Honor. [58]

The Court: I'll then overrule the objection.

Q. When you and Jakor Aleksich were working that day, what happened to Jakor?

Mr. Poore: Just a moment: If your Honor please we object to the question for the reason that

(Testimony of Mike Pezelj.)

it is irrelevant and immaterial in that plaintiff's complaint does not allege that the death was accidental.

The Court: Overruled.

Q. You may answer now: What happened to Jakor Aleksich? Was it morning or evening?

A. It was evening; night shift. Well, when we come down we were looking around and just about that time the boss come down and we looked up over and it was looking kind of tough and he told us he said "One of you go up and cave the chute on the top——"

Mr. Poore: (Interrupting) We object to this as hearsay.

The Court: Yes, it is hearsay.

Q. What happened to Jakor Aleksich?

A. Well he got hit by a rock.

Q. How big a rock was it?

A. The rock was I should say about three feet wide and about eight feet long and between eighteen and twenty inches thick.

Q. When he got hit by the rock, what did the rock do?

A. Well when he got hit, the way he was standing on the timber the rock got him struck down on the timber and crushed and busted.

Q. Crushed what? [59]

A. The rock busted all to pieces, didn't stay in one piece when it hit the timber; then when the rock busted like that it kind of pushed him down

(Testimony of Mike Pezelj.)

in the muck where he went down to the second set where he was pinned to the brow.

Q. What part of his body was pinned?

A. When I looked at the back to see that everything was all right I jumped down there to get some of the rocks off him, off his legs, which they were up in the muck and the top of his body was down, went down through the hole, and the rock had pinned him on the back right against that brow and cap.

Q. What if anything did he say to you?

A. He was calling for help "quick, help". When I got down there I saw I couldn't do nothing alone. I went across this old place, the old raise that was into the other stope to get the other two miners.

Q. Can you tell the Court just generally what part of Jakor's body was broken?

A. The way it looked to me it was his hips and legs.

The Court: Where did the rock come from that hit him?

A. It came right on kind of an angle from the hanging and the back.

The Court: On an angle from the back and the hanging wall, is that it? A. That is it.

Mr. Maury: That is all.

Mr. Meyer: We have no cross examination.

(Witness excused.) [60]

JULES H. HEILBRONNER,

called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Maury:

Q. Mr. Heilbronner will you state your name?

A. Julian H. Heilbronner.

Q. What is your profession or business?

A. Insurance.

Q. How long have you followed that occupation or profession, if you can remember back that far?

A. General insurance about forty years; life insurance about thirty-five years.

Q. Have you with you the mortality tables as used by some standard life insurance company of the United States and for the north temperate zone?

A. Well yes, the United States, that is the North American zone on which we operate.

Q. Mr. Heilbronner by consulting that table can you inform the Court of the expectancy of life of a man fifty-six years and four months old?

A. Yes.

Q. Will you now examine the tables and tell the Court what is, according to the American table of statistics, mortality statistics, the expectancy of life of a man fifty-six years old?

Mr. Meyer: To which the defendant objects for the reason that the same is incompetent, irrelevant and immaterial; that it does not prove or tend to prove any issue in this case; for the further reason

(Testimony of Jules H. Heilbronner.)

that under the policy forming the basis of plaintiff's cause of action, the life expectancy of the decedent Jakor Aleksich or of any person of the age of fifty-six years is irrelevant and incompetent for any purpose in this case; and that it is further irrelevant and immaterial because the expectancy of life of the deceased Jakor Aleksich or of any person of the age of fifty-six years does not enter into or is not competent to prove any issue which is properly before the Court in this matter;

And for the further reason that the measure of indemnity to or which plaintiff herein would be entitled if at all is definitely set forth and measured in the policy of insurance attached to and made a part of plaintiff's complaint upon which plaintiff's cause of action is based.

The Court: Overruled.

Mr. Meyer: Exception.

Q. You remember the question now Mr. Heilbronner?

A. The expectancy of a man fifty-six years old?

Q. Fifty-six years.

A. At the age of fifty-six his expectancy is 16.72 years.

A. 16.72 years.

Q. Mr. Heilbronner can you inform the Court as to the customary and ordinary price charged for annuities for a man fifty-six years old by a responsible life insurance company in the United States?

A. Yes, I can. [62]

Q. And is that price which you can give based

(Testimony of Jules H. Heilbronner.)

on hundred dollars a year or one thousand dollars or what?

A. One hundred or any amount.

Q. And there is no change in rate for increase of amount?

A. No, the rates is the same.

Q. The rate would be the same if the annuity were one hundred dollars or two thousand dollars or three thousand dollars? A. Yes.

Q. And what would be with some responsible insurance company in the United States an annuity of one hundred dollars per year for a man fifty-six years old?

Mr. Meyer: To which we object, if the Court please, and without specifically stating the objection may it be understood that the grounds which were stated in our objection to the question regarding annuity and mortality tables may go this question?

The Court: Yes, it is so understood and the objection is overruled.

Mr. Meyer: An exception.

Q. Answer the quest Mr. Heilbronner.

A. Annuity for one hundred dollars annually?

Q. That is payable annually.

A. One hundred dollars payable annually would require a single premium of \$1706.60.

Q. And such income as would leave nothing when the man died? [63]

Mr. Meyer: We make the same objection.

The Court: Overruled and exception noted.

(Testimony of Jules H. Heilbronner.)

A. There would be nothing left after the man dies.

Mr. Maury: That is all.

Mr. Poore: No cross-examination.

(Witnessed excused.)

Mr. Maury: The plaintiff rests.

Mr. Meyer: If the Court please we desire to now interpose a motion for a non-suit and a dismissal of the action and as grounds for the motion we state:

1. That the Court does not have jurisdiction over the subject matter of the action, in that the sum which the plaintiff can recover herein under the proof herein adduced cannot equal the sum of three thousand dollars exclusive of interest and costs;

2. The Court does not have jurisdiction over the subject matter of the action in that the sum which the plaintiff can recover herein under any possible theory cannot equal the sum of three thousand dollars exclusive of interest and costs;

3. That the complaint herein does not state a claim upon which relief can be granted to plaintiff.

The Court: The motion will be denied and an exception will be granted to defendant.

Mr. Meyer: I suppose the record should show that the defendant rests, that we do not offer any proof.

The Court: Yes. And also let the record show [64] that the plaintiff having this day served her brief in chief upon counsel for the defendant, that

the defendant is granted twenty days from this date within which to prepare, serve and file an answering brief; that plaintiff is granted ten days after receipt of the answering brief of defendant within to prepare, serve and file a reply brief thereto if so advised; that upon the filing of the reply brief, or upon expiration of the time for the filing of the reply brief the case will be deemed submitted to the Court for its consideration and decision.

It is further ordered in this case that each of the parties to the action may have and are hereby granted time up to and including the time granted for the filing of plaintiff's reply brief in which to prepare, serve and lodge with the Clerk of this Court proposed findings of fact and conclusions of law. [65]

Thereafter, on September 24, 1946, an Order of Transmission of Original Exhibits was duly made and filed herein, being in the words and figures following, to-wit:

[Title of District Court and Cause.]

ORDER OF TRANSMISSION OF ORIGINAL EXHIBITS

Upon application of counsel for the plaintiff and appellant above named, and it appearing to the Court that plaintiff's Exhibits numbered 1 and 2, received in evidence at the trial of the above entitled cause, should, by reason of their form and contents, be sent to the Appellate Court in lieu of

copies, under Rule 75, Sec. (i) of the Rules of Civil Procedure.

It Is Hereby Ordered that such original plaintiff's exhibits numbered 1 and 2 be, by the Clerk of this Court, duly certified to the United States Circuit Court of Appeals for the Ninth Circuit, and transmitted to the said Clerk of the Circuit Court of Appeals by mail, with the record on appeal in said Court, said exhibits to be returned to the Clerk of this Court after the final disposition of said appeal, according to the practice of the Clerk of said Circuit Court of Appeals.

Dated this 24th day of September, 1946.

/s/ R. LEWIS BROWN,
Judge.

Filed and entered Sept. 24/46.

/s/ H. H. WALKER,
Clerk. [67]

Thereafter, on September 24, 1946, a Designation of Contents of Record on Appeal was duly filed herein, being in the words and figures following, to-wit:

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

Appellant, Alva Aleksich, as administratrix of the estate of Jakor Aleksich, deceased, plaintiff

above named, hereby designates the contents of the record on appeal:

1. Complaint.
2. The order allowing amendment to complaint.
3. Answer.
4. The findings and the supplemental finding of the presiding judge.
5. All of the evidence.
6. The judgment.
7. The notice of appeal.
8. The evidence by question and answer.
9. Statement of points on appeal.
10. This document of designation.

There is filed herewith two copies of the reporter's transcript of the evidence.

Dated this 24th day of September, 1946.

H. L. MAURY,
A. G. SHONE,
Attorneys for plaintiff and ap-
pellant.

Filed Sept 24/46.

H. H. WALKER,
Clerk.

Service admitted Copy received Sept. 24/46.

WILLIM MEYER,
JAMES A. POORE, JR. M.M.
Attorneys for Appellee. [69]

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD ON APPEAL

United States of America,
District of Montana—ss.

I. H. H. Walker, Clerk of the District Court of the United States in and for the District of Montana, do hereby certify to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 69 pages, number consecutively from 1 to 69, inclusive, is a full, true and correct transcript of all matter designated by the parties and required by rule as the record on appeal in case No. 178. Alva Aleksich, as administratrix of the Estate of Jakor Aleksich, deceased, v. Mutual Benefit Health and Accident Association, a corporation, as appears from the original records and files of said District Court in my custody as such Clerk.

I further certify that the costs of said Transcript amount to the sum of Fourteen and 20/100 Dollars (\$14.20), and have been paid by the appellant.

Witness my hand and the seal of said District Court at Butte, Montana, this 25th day of October, A. D. 1946.

[Seal]

H. H. WALKER,
Clerk.

By /s/ D. F. HOLLAND,
Deputy Clerk. [70]

[Endorsed]: No. 11457. United States Circuit Court of Appeals for the Ninth Circuit. Alva Aleksich, as Administratrix of the Estate of Jakor Aleksich, deceased, Appellant, vs. Mutual Benefit Health and Accident Association, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed October 28, 1946.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11457

ALVA ALEKSICH, as Administratrix of the
Estate of Jakor Aleksich, deceased,
Appellant,
vs.

MUTUAL BENEFIT HEALTH AND ACCI-
DENT ASSOCIATION, a corporation,
Appellee.

ADOPTION OF STATEMENT AND
DESIGNATION FOR PRINTING

To the Appellee above named, and to Messrs.
William Myer and James A. Poore, its Attorneys:
Please Take Notice that the appellant adopts as
her points on appeal the statement of points ap-

pearing in the transcript of the record, and requests that the record be printed in its entirety. However, the attention of the Clerk is called to the fact that there is a rule that no document be repeated in the printed transcript. The policy of insurance, by copy, is an exhibit to the complaint. It is also an exhibit to the Answer. Only one should be printed. All of the Findings and Conclusions are in the record twice, with the exception of the Supplemental Finding made by the Court. All of such Findings are copied into the Judgment, except the Supplemental Finding. This should not be duplicated.

/s/ H. L. MAURY,

/s/ A. G. SHONE,

Attorneys for Appellant.

Service of the foregoing document admitted, and copy received, and we agree that the policy of insurance should not be printed twice, and that it is sufficient to print the Findings and Conclusions, as found in the Judgment, only once, and that the Supplemental Finding made by the Court be printed.

Dated October 31, 1946.

/s/ JAMES A. POORE,

/s/ WILLIAM MEYER,

Attorneys for Appellee.

[Endorsed]: Filed Nov. 4, 1946.